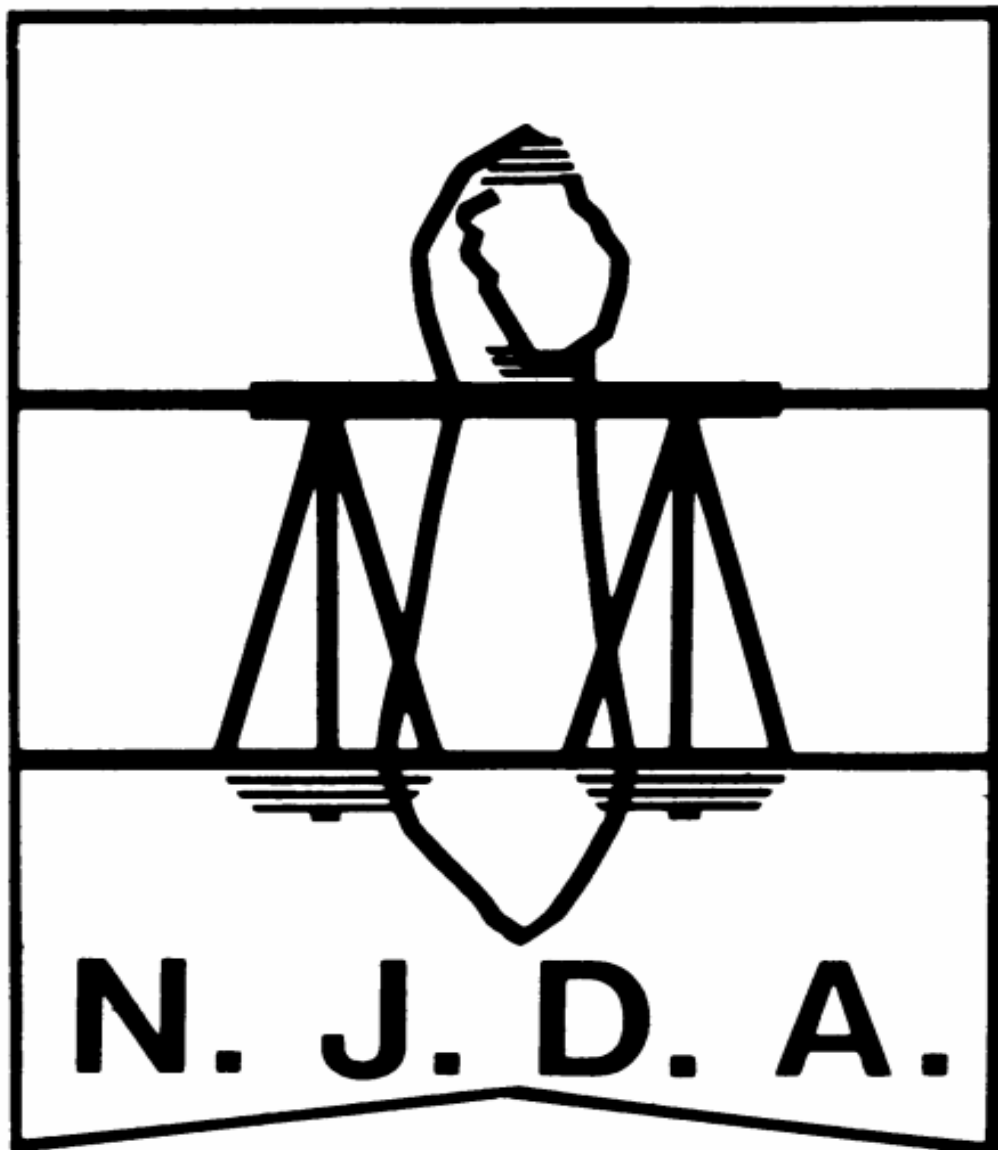


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Special Reprint Edition
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inside...

*New Jersey's Mass Tort
Guidelines*

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with contributions from
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NEW JERSEY'S MASS TORT GUIDELINES

Deanna L. Koestel, Esq. with contributions from Steven A. Karg, Esq.

The centralization of multiple lawsuits involving the same product or event can have significant effects on both defense strategy and client reputation. Despite the serious ramifications of a mass tort designation, until as recently as a year ago, counsel for potential mass tort defendants in New Jersey had no real opportunity to oppose a proposed mass tort designation. Once the New Jersey Supreme Court decided to designate a category of cases as a "mass tort," the parties to the newly consolidated cases simply received notice that their cases would proceed through discovery in one court.

Fortunately, times have changed. In October, 2003, the New Jersey Supreme Court approved "Mass Tort Guidelines", promulgated under Rule 4:38A ("Centralized Management of Mass Torts").¹ These guidelines, discussed below, provide an important insight into the judicial process of mass tort designation. More importantly from defense counsel's perspective, Rule 4:38A cures the most significant procedural defect in the former mass tort designation process by finally providing the parties an opportunity to be heard. Although this is an important step forward in the mass tort designation process, it does not eliminate many of the potentially negative effects of a mass tort designation for defendants.

The New Rule

The new guidelines under Rule 4:38A allow for the Assignment Judge in any forum or any attorney in any eligible case to request the Supreme Court to classify a category of cases as a mass tort and assign them to a designated judge for centralized management. In a significant departure from the prior practice, the current guidelines require service of this request on all interested parties. Moreover, a Notice to the Bar must appear in the legal newspapers and in the Mass Tort Information Center on the Judiciary's website. This notice must disclose where and when comments and objections to the application can be

made.

After the required notice is given, the Administrative Director of the Courts then collects all comments and objections and submits them to the Supreme Court for review and decision. If the Supreme Court determines that a category of cases should be classified as a mass tort, the cases will be reassigned to a designated judge in a particular venue for centralized management based on issues of fairness, geographical location of the parties and attorneys, and the existing civil and mass tort caseload in a particular venue. The Court then enters an appropriate Order which is forwarded to all Assignment Judges and Civil Presiding Judges, published in the legal newspapers, and posted in the Mass Tort Information Center on the Judiciary's website.² At this time, New Jersey has three such "mass tort" courts presided over by the Honorable Charles J. Walsh in Bergen; the Honorable Carol E. Higbee in Atlantic County; and the Honorable Ann G. McCormick in Middlesex County.³

Once the initial order of the Supreme Court is entered, related actions are transferred from the counties in which they were filed to the designated mass tort court *without further application to the Supreme Court*. Thereafter, the assigned judge has discretion to review, sever and return to the original counties of venue any cases that no longer warrant centralization. The mass tort court also retains discretion to keep the centralized cases for trial or to terminate centralized management and return any unresolved matters to their original counties of venue. If the mass tort court determines that centralized management is no longer necessary or appropriate under the circumstances, it will send a written report to the Administrative Director, with copies to the Assignment Judge, Civil Presiding Judge, Trial Court Administrator and Civil Division Manager of the vicinage detailing the matters resolved as

(Continued on page 2)

MASS TORT GUIDELINES

(Continued from page 1)

well as particulars concerning any unresolved matters being returned. This report is then presented to the Supreme Court for review.

The guidelines set forth criteria to be applied in determining whether designation of a case as a mass tort is appropriate. The following factors, among others, are considered by the New Jersey Supreme Court in making its determination:

1. Whether the cases possess the following characteristics:
 - a. they involve large numbers of parties;
 - b. they involve many claims with a common, recurrent issue of law and fact that are associated with a single product, mass disaster, or complex environmental or toxic tort;
 - c. there is geographical dispersement of the parties;
 - d. there is a high degree of commonality of injury or damages among plaintiffs;
 - e. there is value interdependence between different claims, that is, the perceived strength or weakness of the causation and liability aspects of the case are often dependent upon the success or failure of similar lawsuits in other jurisdictions; and
 - f. there is a degree of remoteness between the court and actual decision-makers in the litigation, that is, even the simplest of decisions may be required to pass through layers of local, regional, national, general, and house counsel.
2. Whether there is a risk that centralization may unreasonably delay the progress, increase the expense, or complicate the processing of any action, or otherwise prejudice a party;

3. Whether centralized management is fair and convenient to the parties, witnesses and counsel;
4. Whether there is a risk of duplicative and inconsistent rulings, orders or judgments if the cases are not managed in a coordinated fashion;
5. Whether coordinated discovery would be advantageous;
6. Whether the cases require specialized expertise and case processing as provided by the dedicated mass tort judge and staff;
7. Whether centralization would result in the efficient utilization of judicial resources and the facilities and personnel of the court;
8. Whether issues of insurance, limits on assets and potential bankruptcy can be best addressed in coordinated proceedings; and
9. Whether there are related matters pending in Federal court or in other state courts that require coordination with a single New Jersey judge.

Following its determination of whether a category of cases should be classified as a mass tort, the Supreme Court typically does not issue any opinion or statement explaining its decision. The Court simply issues a short notice that states whether the case has been designated as a “mass tort,” pursuant to Rule 4:38A. If the application is rejected, the pending cases continue under individual management in the counties where previously venued.

Potentially Negative Effects of a Mass Tort Designation

As much of the defense bar is already aware, a mass tort designation can have potentially negative ramifications for defendants and the public alike. For defendants, the publicity of

(Continued on page 3)

MASS TORT GUIDELINES

(Continued from page 2)

a mass tort designation threatens business reputation and the bottom line. If a product is publicized as part of a “mass tort,” not only does the product brand at issue suffer significant harm but the defendant itself may suffer harm by association. Unfortunately, the defendant incurs the costs associated with the negative press and the loss of good will long before the merits of the cases are sufficiently tested.

A mass tort designation can sometimes pressure a defendant into considering settlement regardless of the merits of a particular claim. The negative press and the associated costs of such a designation can be substantial. Moreover, when the Court centralizes cases under the program, the likelihood of marginal or baseless claims “piggybacking” on the merits and efforts of a few potentially legitimate claims increases. This can result in a defendant’s obligation to defend an undue number of claims. After all, once a product or event is designated as a “mass tort,” little more than a notice is required to join the group of existing plaintiffs.

A mass tort designation can have undue negative effects on the public as well. For example, in the pharmaceutical industry, once a medication is classified as part of a “mass tort” program, patients who need and benefit from the medication may become fearful and discontinue its use despite important benefits. In such a case, patients who need the medication suffer even though there has been no adjudication of a defect. Moreover, the medication may be the subject of multiple lawsuits as the result of an isolated issue affecting a small population of users. Even if the Court ultimately determines that the medication lacked an adequate warning for the isolated issue, a mass tort designation can result in its discontinued use by a much greater population of patients who benefit from the product and for whom the product is not defective.

A mass tort designation in New Jersey enables forum shopping and can negatively impact the docket of New Jersey courts. Centralization of claims often results in litigation in a forum in which the alleged tort and the alleged injury did not occur. As a result, defendants cannot obtain the live trial testimony of critical witnesses such as treating and prescribing physicians, and have the additional burden and expense of coordinating discovery across the country. Once a category of cases is designated as a mass tort in New Jersey, foreign plaintiffs feel more welcome to file cases here, which increases the burden of an already busy judiciary. When this occurs, careful consideration of forum *non-conveniens* dismissals is critical to avoid a *de facto* nationwide class action and the resulting prejudice to the defendant.

In sum, the “mass tort” designation of a category of cases poses many hurdles and threatens the business reputation of a defendant before any adjudication on the merits. The recent institution of guidelines provides counsel an opportunity to be heard before such a classification, as well as a framework from which to construct an argument. The new guidelines represent a significant improvement to the process.

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1. The Mass Tort Guidelines and Information Center can be found on the Judiciary’s Internet website, <http://www.judiciary.state.nj.us/mass-tort/index.htm>.
2. <http://www.judiciary.state.nj.us/mass-tort/index.htm>.
3. Judge McCormick replaces the Honorable Marina Corodemus in Middlesex County. Judge Corodemus recently retired from the bench after a distinguished judicial career.